Supreme Court, U.S.
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No. 98-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *et al.*,

Petitioners,

vs.

PATSY ANN BYERS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, except that it omits Royal Indemnity Company, who is intervening in the suit for worker's compensation benefits paid to the Byers family as a result of her on-the-job injury.

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STATEMENT OF THE CASE

The petition seeks review of a decision of the Court of Appeal for the First Circuit, State of Louisiana. The opinion of the lower court interpreted Louisiana procedural law to hold Respondents had stated a cause of action which did not run afoul of First Amendment guarantees of free speech (as defined by this Honorable Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). To reverse the decision of the lower court would be akin to holding that mass media defendants are entitled to blanket immunity from the filing of suits which, on their face, set forth valid exceptions to constitutional free speech provisions.

The ruling Petitioners complain of is naught but a recognition of well-established Louisiana procedural law which holds that, for purposes of an exception of no cause of action, the allegations of Respondents' petition are accepted as true. Should plaintiffs be unable to adduce evidence to support their *Brandenburg*-based allegations, there will be ample opportunity for Petitioners to raise the constitutional arguments properly both before and after trial.[1] Thus, Petitioners have neither been irretrievably hauled into court nor been the subject of a judgment which changes constitutional law in any way.

A. Factual Background

On the night of March 8, 1995, Patsy Byers was working alone at a convenience store in rural Louisiana. Sarah

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1. The lower court did not directly address the merits of Petitioners' First Amendment defense, Respondents respectfully submit neither Respondents nor this Honorable Court should delve too deeply into its merits at this juncture. Nonetheless, Respondents note Petitioners' application "softpedals" the fact there is evidence Petitioners knew or intended imminent lawless activity to follow viewing of their speech. Thus, there is a good faith basis for the pleading.

Edmondson entered the store shortly before midnight; waiting outside was her boyfriend, Ben Darrus. After engaging in a brief conversation with Byers, Edmondson drew a pistol and fired a bullet which shattered Byers' spine. Byers was left a quadriplegic. She eventually perished from a cancer which was not timely detected due to her quadriplegia.

After Darrus and Edmondson were caught, it was learned the pair had repeatedly viewed a videotape of "Natural Born Killers," directed, produced, and distributed by Petitioners, Time Warner Entertainment Company, L.P., Time Warner Inc., Alcor Film & TV GMBH & Co. Produktions KG, Jane and Don Productions, Inc., and Oliver Stone. Said film traced the exploits of a pair of young lovers ("Mickey and Mallory") on their cross-country orgy of graphic murder and mayhem. The film is rife with overt and sublime images of violence and glorification of violence, and leaves Mickey and Mallory as media darlings who escape final punishment for their horrific crimes.

After viewing the tape, Darrus and Edmondson decided to emulate its protagonists, obtained a pistol, left their home state of Oklahoma, and, like Mickey and Mallory, began their own cross-country murder spree. They stopped in Mississippi and murdered a local businessman, Bill Savage. They then went to Louisiana, and randomly decided to rob and murder Patsy Byers, just like Mickey and Mallory did in the film.

B. Proceedings Below

After the Byers family discovered the underlying cause of the teenagers' rampage, Petitioners were sued. The state court petition was amended twice, with the final allegations against Petitioners (referred to as the "Hollywood defendants") reading as follows:

IIC.

Upon information and belief, defendants, Benjamin Darrus and Sarah Edmondson, went upon a crime spree culminating in the shooting and permanent injury to Patsy Ann Byers as a result of seeing and becoming inspired by the movie "Natural Born Killers" produced, directed and distributed by the Hollywood defendants.

* * *

V.(E).

All of the Hollywood defendants are liable, more particularly, but not exclusively: A) for producing and distributing a film (and marketing same on videotape) which they knew, intended, were substantially certain, or should have known would cause or incite persons such as defendants, Sarah Edmondson and Benjamin Darrus. (via . . . glorification of violent acts) to begin, shortly after repeatedly viewing same, crime sprees such as that which led to the shooting of Patsy Ann Byers; B) for negligently and/or recklessly failing to take steps to minimize violent content of the video or to minimize glorification of senselessly violent acts and those who perpetrate such conduct . . . D) for negligently and/or recklessly failing to warn viewers of the potential deleterious effects upon teenage viewers caused by repeated viewing of the film/ video . . .[2]

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2. Allegations of subliminal messages in the film exhorting violence were also made, but, after expert examination of the video revealed no such detectable messages, this allegation was abandoned.

Appendix to Petition for Writ of Certiorari, at pp. 4a, 5a and 21a. Petitioners then filed an exception of no cause of action, a Louisiana procedural vehicle designed to test whether a suit states a legally sufficient cause of action (akin to a Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings).

On January 23, 1997, the Twenty-First Judicial District Court for the Parish of Tangipahoa, State of Louisiana, granted Petitioners' Exception and dismissed the case. Appendix to Petition for Writ of Certiorari, at pp. 21a-25a. On appeal, the Court of Appeal for the First Circuit reversed this decision. Appendix to Petition for Writ of Certiorari, at p. 1a; *Byers v. Edmondson*, 712 So. 2d 681 (La. App. 1st Cir. 1998). The intermediate court held Respondents' allegations were sufficient, standing alone, to state a cause of action against Petitioners which satisfied the *Brandenburg* exception to First Amendment immunity:

> Byers argues that "Natural Born Killers" falls within the incitement to imminent lawless activity exception to the First Amendment . . . [T]o justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. Moreover, speech does not lose its First Amendment protection merely because it has "a tendency to lead to violence."
>
> In Byers' . . . petition, it is alleged that the Warner defendants intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees

> such as the one that led to the shooting of Patsy Byers. We must accept this allegation as true for purposes of the peremptory exception raising the objection of no cause of action. Once accepted as true, the film "Natural Born Killers," would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action.

Appendix to Petition for Writ of Certiorari, at pp. 14a-15a; 712 So. 2d at 690-92 (citations omitted).

The Supreme Court of Louisiana unanimously denied Petitioners' writ application. Appendix to Petition for Writ of Certiorari, at pp. 26a-27a; *Byers v. Edmondson*, No. 98-1596 (La. 10/9/98); __ So. 2d __. The instant certiorari application followed.

REASONS FOR DENYING THE WRIT

This case is literally in its embryonic stages. No discovery has been taken. All that exists is a lawsuit which almost literally alleges the video in question intended to incite imminent lawless activity and thereby almost literally satisfies the *Brandenburg* criteria as set forth by this Honorable Court. The lower court's judgment is not final because Petitioners may raise their First Amendment defense via summary judgment after discovery. In essence, Petitioners are aggrieved that no evidence beyond Respondents' allegations is necessary to proceed with the lawsuit, and are asking this Honorable Court to pronounce that, in every instance, no suit may be brought against filmmakers for imitative violence that they intended to flow from their motion pictures.

To defeat the exception of no cause of action, Respondents were only required to plead a cause of action which fell under the *Brandenburg* exception to First Amendment immunity. The mere pleading sufficed because Louisiana law dictates that, for purposes of determining whether a cause of action is stated, the allegations of a petition are accepted as true; the suit is to be dismissed only if the plaintiff has no cause of action under any evidence admissible under the pleadings. La. Code Civ. P. art. 927; *Roberts v. Sewerage and Water Board of New Orleans*, 624 So. 2d 341 (La. 1994). Louisiana law demands all allegations be accepted as true in the arena of exceptions of no cause of action, insofar as an exception of no cause of action does not test whether the plaintiff can eventually prove the allegations. *Kuebler v. Martin*, 578 So. 2d 113 (La. 1991); *Lybrand v. Newman, Drolla, Mathis, Brady & Wakefield*, 663 So. 2d 850 (La. App. 5th Cir. 1995).

Respondents stated a *Brandenburg* violation by alleging Petitioners were liable

> for producing and distributing a film . . . which they knew [or] intended . . . **would cause** or **incite** persons such as . . . Edmondson and . . . Darrus . . . to begin, **shortly after repeatedly viewing same**, crime sprees such as that which led to the shooting of Patsy Ann Byers.

Appendix to Petition for Writ of Certiorari, at 4a-5, citing Byers Third Supplemental and Amending Petition, at V.(E) (emphasis added). The requirement of statements on immediacy, incitement, and likelihood were satisfied, as Respondents alleged intentional incitement to begin a cross-country crime spree which began with the murder of Bill Savage and ended with the attempted murder of Patsy Byers.[3]

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3. Petitioners argue the lower court failed to consider the imminence and likelihood prongs of the *Brandenburg* test. This is simply (Cont'd)

Even if Petitioners correctly assert these allegations were not specific enough to state a cause of action uninsulated by *Brandenburg*'s exception to First Amendment immunity, Louisiana law forbids dismissal of Respondents' action for mere failure to state, verbatim, all elements of the *Brandenburg* test.

Because all allegations are to be construed in favor of maintaining the sufficiency of the petition and allowing the plaintiff the opportunity to later present evidence, *Jarell v. Carter*, 577 So. 2d 120 (La. App. 1st Cir. 1991), the court of appeal was required to read Respondents' allegations generously so that all elements of the *Brandenburg* exception were stated. Even if a charitable reading failed to show all elements of the *Brandenburg* exception were stated, Respondents would be nonetheless be allowed to amend their petition to state with particularity all elements of the *Brandenburg* test. *Homer National Bank v. Tri-District Development*, 534 So. 2d 154 (La. App. 3d Cir. 1988) (even if allegations are lacking, courts must allow plaintiffs opportunity

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(Cont'd)
not so, as the opinion itself shows the lower court knew and considered all prongs of the *Brandenburg* test:

> [T]o justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. Moreover, speech does not lose its First Amendment protection merely because it has "a tendency to lead to violence."

712 So. 2d at 690, citing *Brandenburg* and *Hess v. Indiana*, 414 U.S. 105 (1973).

to amend petition to cure objections rather than dismiss); *Illinois Central Gulf Railroad v. Texaco, Inc.*, 467 So. 2d 1141 (La. App. 5th Cir. 1985) (same).

Petitioners claim the decision of the lower court allows

> lawsuits to proceed based on nothing more than conclusory allegations of subjective intent without requiring any showing of an objective manifestation of intent to induce imminent lawless action.

Petition for Writ of Certiorari, at 9.

Based on the above principles of Louisiana law which were repeatedly argued below, Respondents respectfully submit *no showing could have been made*! It should also be noted Petitioners themselves took advantage of the bar on admissibility of evidence at this juncture, as they successfully blocked Respondents' attempts to introduce the "speech" itself, a copy of the tape "Natural Born Killers." 712 So. 2d 685-86 n. 9. Thus, Petitioners have no one but themselves to blame for a published lower court opinion allowing this case to proceed on mere allegations; indeed, if they had merely waited until after discovery and tested the allegations via summary judgment, a "showing" would have been required.[4] Respondents therefore respectfully assert Petitioners should not be heard to complain Respondents did not make the requisite "showing" of either Petitioners' malicious intent or whether their speech was factually likely to incite imminent lawless activity.

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4. Such a showing would necessarily include exhibition of the tape itself, along with the proud words of Oliver Stone that "The most pacifistic people in the world said they came out of this movie and wanted to kill somebody." New York Times, April 14, 1996.

Petitioners argue this judgment is somehow final and therefore deserving of this Court of last resort's attention. Despite Petitioners' assertions, the lower court did not decide with *any* finality whether, under the facts of this case, the First Amendment insulated Petitioners from liability. The lower court took special pains to hold only that plaintiffs had made the proper allegations under this Court's jurisprudence to state a claim not covered by First Amendment immunity:

> However, in holding that plaintiffs' allegations of intent state a cause of action, **we *do not address* the issue of whether the Warner defendants may later invoke the protection of the First Amendment guarantee of free speech to bar Byers' claim after discovery has taken place. It is only by accepting the allegations in Byers' petition as true that we conclude that the film falls into the incitement to imminent lawless activity exception to the First Amendment.** We agree with *Rice v. Paladin Press, Incorporated*, 128 F.3d 233 [(4th Cir.1997), writs denied, ___ U.S. ___, 118 S. Ct. 1515 (1998)] that the mere foreseeability or knowledge that the publication might be misused for a criminal purpose is not sufficient for liability. Proof of intent necessary for liability in cases such as the instant one will be remote and even rare, *but at this stage of the proceeding* we find that Byers' cause of action is not barred by the First Amendment.

Appendix to Petition for Writ of Certiorari, at 710 So. 2d at 692 (emphasis added). Thus, Petitioners' defense may be addressed again after discovery and via summary judgment, a fact the lower court specifically recognized. 712 So. 2d at 691.[5]

5. The lower court also correctly noted that, in most of the cited by Petitioners, the First Amendment issue was addressed after discovery

(Cont'd)

Respondents feel constrained to add that, on the merits, their action should be allowed to go forward, notwithstanding the purportedly "chilling" effects the mere filing of suits has on free expression. In the recent and previously-cited *Rice v. Paladin Enterprises* decision, this Honorable Court properly left undisturbed an opinion disallowing First Amendment immunity for a media defendant who intended its speech to incite imminent criminal activity.

In *Rice*, a publisher defendant stipulated its book (a manual for murder) was intended to be used by murderers. The lower court found similar arguments of First Amendment immunity from civil suits by victims of those using the book unconvincing:

> Paladin and amici insist that recognizing the existence of a cause of action against Paladin predicated on aiding and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications, or movies. This is simply not true. In

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(Cont'd)
and, in some cases, after full-blown trial. 712 So. 2d at 688. *See also Way v. Boy Scouts of America*, 856 S.W. 2d 230 (Tex. App. 5th Dist. 1993) (dismissal based on First Amendment after motion for summary judgment); *Yakubowicz v. Paramount Pictures*, 536 N.E. 2d 1067 (Mass. 1989) (same); *Bill v. Superior Court of City and County of San Francisco*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1st Dist. 1982) (same); *DeFillipo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (same); *Walt Disney Productions v. Shannon*, 247 Ga. 402, 276 S.E. 2d 580 (1981) (same); *Olivia N. v. NBC, Inc.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981) (judgment of dismissal granted during trial); *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987) (judgment dismissing First Amendment claims after contrary jury verdict).

> the "copycat" context, it will presumably **never** be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.
>
> And, perhaps most importantly, there will almost never be evidence proffered from which a jury even **could** reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity . . . Moreover, in contrast to the case before us, in virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the speaker intended to assist and facilitate the criminal conduct described or depicted.

128 F.3d at 249, 254 and 265 (emphasis in original).[6]

While Respondents do not have such a stipulation from Petitioners, they have a procedural conclusion which, at this point in the litigation, carries the same effect: their allegations

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6. In *Rice*, the court of appeals believed that there could never be another case where a media defendant was either so arrogant or malicious that it would *desire* "copycats" and, worse, that there would be any evidence of this desire. Here, Respondents submit they have such evidence, and should be allowed to further develop this evidence to show their case is not a mere frivolity.

that Petitioners intended to facilitate imminent unlawful conduct and are therefore unprotected per *Brandenburg*. If Stone and the other Petitioners intended (as defined by state law and as supported by excerpts of the interview of Oliver Stone) that those exposed to their speech "go out and kill somebody" right after seeing the movie, then their conduct is, like that presented in *Rice* and unlike that presented in the myriad of decisions cited by Petitioners, unprotected by the First Amendment. Respondents therefore respectfully assert this case is the rarity which does not entitle the "speakers" to First Amendment protection from the fallout of their profit-motivated speech.

CONCLUSION

This case does not, at this time, present a federal constitutional question ripe for adjudication by this Honorable Court. Likewise, this case does not cast a "pall of fear and timidity" as Petitioners suggest, given the lower court's express holding that Petitioners may reassert their First Amendment claims after discovery. Indeed, all that has happened is a state intermediate court interpreted state procedural law and found Respondents stated a claim which, if true, satisfied the *Brandenburg* exception to First Amendment immunity. That Petitioners are not satisfied with the "showing" made to date is irrelevant as a matter of Louisiana law and a matter of fair play. Petitioners chose the exception of no cause of action as the testbed for their First Amendment defense and even utilized rules surrounding the exception to block examination of the speech itself. For these reasons, Respondents pray the petition for certiorari be denied.

Respectfully submitted,

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